Supreme Court, U.S.
FILED
MAY 11 2001
OFFICE OF THE CLERK

(3)

No. 00-1412

In the Supreme Court of the United States

ROBERT R. RAYMOND AND ROBERT G. BERNHOFT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

CLAIRE FALLON
Acting Assistant Attorney General

RICHARD FARBER
THOMAS J. SAWYER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10 pp

QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction to enjoin petitioners from promoting and selling a tax-protest program that contained false and fraudulent statements regarding the federal income tax system.

2. Whether summary judgment was properly entered in this case when there were no material facts in dispute.

3. Whether an injunction prohibiting petitioners from selling tax-protest materials that contained false and fraudulent statements, from inciting others to violate federal tax laws, and from filing frivolous Freedom of Information Act (FOIA) requests with the government violated the First Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	9
Brandenburg v. *Ohio* 395 U.S. 444 (1969)	10
Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980)	10
Great W. Land & Dev., Inc. v. *SEC*, 355 F.2d 918 (9th Cir. 1966)	10
Near v. *Minnesota*, 283 U.S. 697 (1931)	11
Palmer v. *United States IRS*, 116 F.3d 1309 (9th Cir. 1997)	6, 8
Pittsburgh Press Co. v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973)	10
Rogers v. *Lodge*, 458 U.S. 613 (1982)	6
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	6
Times Film Corp. v. *City of Chicago*, 365 U.S. 43 (1961)	10-11
United States v. *Buttorff*, 761 F.2d 1056 (5th Cir. 1985)	9, 11
United States v. *Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984)	11
United States v. *Estate Pres. Servs.*, 202 F.3d 1093 (9th Cir. 2000)	9, 11

Cases—Continued: Page

United States v. *Kaun*, 827 F.2d 1144 (7th Cir. 1987) 9, 11

United States v. *Nuttall*, 713 F. Supp. 132 (D. Del.), aff'd, 893 F.2d 1332 (3d Cir. 1989) 6

United States v. *One 1941 Cadillac Sedan*, 145 F.2d 296 (7th Cir. 1944) 8

United States v. *One 1972 Cadillac, Coupe*, 355 F. Supp. 513 (E.D. Ky. 1973) 6

United States v. *Twenty-Eight "Mighty Payloader" Coin-Operated Gaming Devices*, 623 F.2d 510 (8th Cir. 1980) 8

United States v. *Walters*, 638 F.2d 947 (6th Cir. 1981) 6, 8

United States v. *White*, 769 F.2d 511 (8th Cir. 1985) 11

Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) 10

Constitution and statutes:

U.S. Const. Amend. I 5, 10, 11

Internal Revenue Code (26 U.S.C.):

§ 6700(a) 5

§ 6700(a)(1)(A)(iii) 2

§ 6700(a)(1)(B) 5

§ 6700(a)(2)(A) 5

§ 7401 8

§ 7402 ..... 4, 7

§ 7402(a) 4, 7

§ 7408 ..... 2, 5, 6, 7, 8, 10, 11

§ 7408(a) 4, 5, 7

§ 7408(b) 8

In the Supreme Court of the United States

No. 00-1412

ROBERT R. RAYMOND AND ROBERT G. BERNHOFT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 228 F.3d 804. The opinion of the district court (Pet. App. 24-25), which adopts the report and recommendation of the magistrate judge (Pet. App. 29-91), is reported at 78 F. Supp. 2d 856.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2000. The petition for rehearing was denied on December 6, 2000 (Pet. App. 99). The petition for a writ of certiorari was filed on March 6, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1996, petitioners advertised and sold a tax-protest plan called "De-Taxing America." The plan contained materials promoting "general tax-protest principles" and set forth the view that the federal income tax is unconstitutional. Pet. App. 2. The materials included forms that guided purchasers through the "de-taxing" process. These forms led purchasers to believe that they no longer had to pay income or social security taxes and that they were entitled to receive refunds of all income taxes paid during the previous three years. *Id.* at 2-3.

After petitioners refused to cooperate with an investigation by the Internal Revenue Service into the "De-Taxing America" program, the Service requested the Department of Justice to file a suit to enjoin petitioners' actions. Pet. App. 4. Section 7408 of the Internal Revenue Code, 26 U.S.C. 7408, authorizes the Secretary of the Treasury to "request" the Attorney General to seek injunctive relief against the promoters of abusive tax shelters. The Code defines "abusive tax shelters" to include a "plan or arrangement" that makes false or fraudulent statements regarding tax deductions, credits or exclusions from income. 26 U.S.C. 6700(a)(1)(A)(iii). The request to the Department of Justice was made in a letter signed by an Assistant District Counsel of the Internal Revenue Service located in Milwaukee, Wisconsin. It was reviewed and approved by the National Office of the Chief Counsel located in Washington, D.C. Pet. App. 74. After receiving that request, the United States filed suit against petitioners to obtain a permanent injunction

against their continued promotion of the "De-Taxing America" scheme.

2. a. Petitioners filed two motions to dismiss the proceeding for lack of subject matter jurisdiction, both of which were denied by the district court. In response to the first motion, the government submitted (i) a redacted copy of the letter from the Assistant District Counsel to the Department of Justice requesting that the suit be filed, (ii) the declaration of the Assistant District Counsel verifying that he was a proper delegate of the Secretary for the purpose of submitting such a request and (iii) the declarations of two officials of the Department of Justice that explained that they had authorized the filing of the suit on behalf of the Attorney General. Pet. App. 8.

The government thereafter filed a motion for summary judgment. Petitioners opposed the motion, claiming that the district court lacked subject matter jurisdiction over the suit. Petitioners also denied that the tax-protest principles promoted in "De-Taxing America" were false. They stated that the program contained statements "which [they] believed, and still believe, to be true." Pet. App. 89. Finally, petitioners submitted declarations stating that they had stopped selling the "De-Taxing America" program and had no intention of selling that program in the future.

b. The district court concluded that the "De-Taxing America" program contained false statements and false advice concerning the federal income tax and therefore granted the government's motion for summary judgment. The court entered an injunction that bars petitioners from (i) selling and marketing the "De-Taxing America" program, (ii) inciting others to violate the tax laws and (iii) filing frivolous Freedom of Information Act requests with the Internal Revenue

Service (IRS). Pet. App. 21-22. The court held that the suit had properly been requested by a delegate of the Secretary, for "[t]he Declaration of Edward G. Langer establishes that the Chief Counsel of the IRS (through his delegate, Assistant Counsel Attorney Langer) authorized and requested the Attorney General" to file the suit. *Id.* at 74.

3. The court of appeals affirmed. Pet. App. 1-23. The court agreed with the district court that the declaration of the Assistant District counsel and the agency's letter requesting the suit established that this action had been properly authorized by the Secretary. *Id.* at 8. The court noted that petitioners "had ample opportunity to produce evidence that contradicts this declaration and have not done so." *Ibid.*

The court further concluded that the jurisdiction of the district court was not, in any event, dependent on the procedures established in Section 7408(a), which specifies that a suit for an injunction may be prosecuted "at the request of the Secretary." 26 U.S.C. 7408(a). The court held that jurisdiction for this suit exists under Section 7402 of the Code, which authorizes the district courts "to make and issue in civil actions, writs and orders of injunction, * * * and such other orders and processes, and to render such judgements and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. 7402(a).

The court of appeals also rejected petitioners' contention that there were disputed facts that precluded the entry of summary judgment. The court noted (i) that the statements made by petitioners "are clearly false representations concerning the government's authority to tax its citizens" and (ii) that the undisputed evidence reflects that petitioners "reasonably should

have known [that these statements] were false." Pet. App. 14, 15.

The court rejected petitioners' assertion that the injunction entered in this case violates their First Amendment rights. Construing the injunction "to prohibit only false, deceptive or misleading commercial speech that is related to the provision of tax advice," and noting that "[i]t is permissible for the government to prevent the dissemination of false or misleading commercial speech," the court held that the injunction should be sustained because it is "narrowly tailored to prohibit only those activities that can be restrained consistent with the First Amendment." Pet. App. 21, 22, 23.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Section 7408 of the Internal Revenue Code authorizes an action by the United States to enjoin any person from "promoting abusive tax shelters" and specifies that such a suit may be "commenced at the request of the Secretary" of the Treasury. 26 U.S.C. 7408(a). The term "abusive tax shelter" encompasses any "plan or arrangement" for making false or fraudulent statements about "the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit * * * ." 26 U.S.C. 6700(a)(1)(B), (2)(A); see 26 U.S.C. 7408(a).

The court of appeals correctly concluded (Pet. App. 8) that the declarations submitted by the government officials in this case, and the redacted copy of the letter requesting that the suit be commenced, sufficiently

established that the suit was "requested" by the Secretary under this provision. Contrary to petitioners' erroneous submission (Pet. 10-16), courts have routinely relied on such declarations and on copies of the actual letters requesting suit to establish that suits have been properly authorized. See, *e.g.*, *Palmer* v. *United States Internal Revenue Service*, 116 F.3d 1309, 1311 (9th Cir. 1997); *United States* v. *Walters*, 638 F.2d 947, 950 (6th Cir. 1981); *United States* v. *Nuttall*, 713 F. Supp. 132, 136-137 (D. Del.), aff'd, 893 F.2d 1332 (3d Cir. 1989).[1] The factual determination that the evidence adduced in this case establishes that the suit had been requested by the Secretary was "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)) and does not warrant review by this Court. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

b. The court of appeals also correctly noted that the jurisdiction of the district court to enjoin petitioners from promoting abusive tax shelters is not, in any event, dependent on a request by the Secretary under Section 7408. Pet. App. 6-7. Section 7408 does not itself confer subject matter jurisdiction on the district courts. Instead, Section 7408 specifies that district court jurisdiction for an action under that Section is "provided in

---

[1] While "the mere allegation of facts necessary for jurisdiction" is not sufficient when those facts are challenged by the defendant (*United States* v. *One 1972 Cadillac Sedan, Coupe*, 355 F. Supp. 513, 515 (E.D. Ky. 1973)), in the present case the government did not rely solely on the allegations of its complaint. Instead, as the court of appeals emphasized, the government submitted sworn declarations and evidence in response to petitioners' motion to dismiss. Pet. App. 8. Petitioners "had ample opportunity to produce evidence that contradicts this declaration and have not done so." *Ibid.*

section 7402(a)." 26 U.S.C. 7408(a). In turn, Section 7402(a) broadly provides that "[t]he district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction * * * as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. 7402(a). The court of appeals correctly recognized (Pet. App. 6-7) that the express language of Section 7408 does not purport to provide a district court with jurisdiction to grant injunctive relief. Instead, that statute refers to and relies upon the broad, general jurisdiction established in Section 7402 over actions "necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. 7402(a).

As the court of appeals observed, "Section 7402(a) explicitly grants district courts the authority to issue injunctions to enforce the tax laws and states that all remedies that are normally available to the United States to enforce its laws are not limited by that section." Pet. App. 7. In this context, the court correctly concluded that the provisions of Section 7408 that authorize injunctive relief against specific acts do not limit the jurisdiction of the courts under Section 7402 to issue remedies encompassed by the latter provision (Pet. App. 7):

> The specific provisions of [Section 7408], including the provision that the suit must be authorized by the Secretary of the Treasury or his delegate, are procedural and not jurisdictional. Therefore, even if we were to conclude that the United States had not received proper authorization from the Secretary of the Treasury, that fact would not affect the jurisdiction of the district court.

The court's holding that a "request" by the Secretary under Section 7408 is a procedural, rather than jurisdictional, requirement for an injunction suit thus comports with the plain language of these provisions. No other court has addressed this issue, and no plausible claim of a conflict among the circuits on this issue can thus be asserted.[2] In any event, because the record supports the determination of both courts below that a "request" was in fact made under Section 7408, this case presents no occasion for review of the court's alternative legal conclusion that Section 7408 is not jurisdictional in character.

2. An injunction may be entered against any person who promotes an abusive tax shelter when such "relief is appropriate to prevent recurrence of such conduct." 26 U.S.C. 7408(b). Courts have described several factors to be considered in determining whether such injunctive relief is appropriate, including (i) the gravity

---

[2] Petitioners suggest (Pet. 8) that the holding in this case is contrary to the Seventh Circuit's own precedent in *United States* v. *One 1941 Cadillac Sedan*, 145 F.2d 296, 299 (1944), as well as decisions of the Sixth, Eighth and Ninth Circuits in *United States* v. *Walters*, 638 F.2d 947, 950 (6th Cir. 1981), *United States* v. *Twenty-Eight "Mighty Payloader" Coin-Operated Gaming Devices*, 623 F.2d 510, 513 n.2 (8th Cir. 1980), and *Palmer* v. *United States*, 116 F.3d 1309, 1311 (9th Cir. 1997). None of those decisions, however, interpreted the statute involved in this case. Instead, those cases interpreted Section 7401 (or its predecessor), a statute that concerns suits brought to collect taxes. Moreover, petitioners err in asserting that those prior decisions held that Section 7401 is jurisdictional. Neither the Seventh, Eighth, nor Ninth Circuit decisions contain any such holding. And, although the Sixth Circuit's opinion describes Section 7401 as "jurisdictional," that description lacked significance in that case because the court concluded that the government's suit had, in fact, been properly authorized. *United States* v. *Walters*, 638 F.2d at 950.

of the harm caused by the promoters, (ii) the extent and intent of their involvement in the scheme, (iii) the isolated or recurring nature of the activities, (iv) the extent of any recognition by the promoters of their own culpability, (v) the likelihood that the occupation of the promoters would place them in a position where future violations could be anticipated and (vi) the sincerity of any assurances given by the promoters against future violations. See *United States* v. *Estate Preservation Services*, 202 F.3d 1093, 1105 (9th Cir. 2000); *United States* v. *Kaun*, 827 F.2d 1144, 1145 (7th Cir. 1987); *United States* v. *Buttorff*, 761 F.2d 1056, 1062 (5th Cir. 1985).

The courts below correctly concluded that an injunction was appropriate in this case notwithstanding the fact that petitioners submitted declarations stating that they had stopped selling the De-Taxing America program and had no intention of resuming such sales. There is no merit to petitioners' contention (Pet. 17-23) that these declarations created a factual dispute regarding their credibility that prevented the entry of summary judgment under this Court's decision in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The district court did not make any determination regarding petitioners' credibility in granting summary judgment for the United States. Instead, the district court assumed that the statements made in petitioners' declarations were sincere (Pet. App. 86). In view of the undisputed fact that petitioners refused to acknowledge "that the steps they took in selling the Program ran afoul of any law," however, the court concluded that "there is no reason to believe that they would not engage in such conduct again if they felt it would serve their purpose." *Id.* at 88, 89. The court therefore "unhesitatingly opine[d] that an injunction is

appropriate in this case to prevent the recurrence by the defendants of conduct which the record shows them to have committed." *Id.* at 89. The judgment entered in this case thus did not turn on, and did not require an examination of, the veracity of petitioners' declarations.[3]

3. The court of appeals correctly held that the injunction granted by the district court in this case did not violate petitioners' First Amendment rights. As the court emphasized, the injunction proscribes only activities that (i) incite others to violate the tax laws, (ii) market documents that provide false or fraudulent tax advice or (iii) involve the initiation of frivolous litigation. Pet. App. 21-22. As the court correctly concluded (*ibid.*), the injunction granted in this case is thus entirely consistent with the decisions of this Court in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), *Times Film Corp.* v. *City of*

---

[3] Petitioners err in contending (Pet. 19-22) that the decision in this case conflicts in this regard with the decision of the Ninth Circuit in *Great Western Land & Development, Inc.* v. *SEC*, 355 F.2d 918 (1966). The *Great Western* case does not hold that summary judgment is inappropriate in an injunction case whenever a promoter submits a declaration stating that he has stopped selling a program and will not do so in the future. To the contrary, in concluding that the totality of "the circumstances" that existed in *Great Western* supported a need for further findings prior to the entry of injunctive relief, the court did not purport to establish a legal standard that governed beyond the particular facts in that case. See *id.* at 919.

Chicago, 365 U.S. 43 (1961), and *Near* v. *Minnesota*, 283 U.S. 697 (1931).

The injunction entered below is also consistent with the relief entered by other courts that have addressed abusive tax shelters under Section 7408 and have upheld injunctions against the "fraudulent conduct" of the promoters. *United States* v. *Estate Preservation Services*, 202 F.3d at 1106. See also *United States* v. *Kaun*, 827 F.2d at 1150-1152; *United States* v. *White*, 769 F.2d 511, 516-517 (8th Cir. 1985); *United States* v. *Buttorff*, 761 F.2d 1056, 1066 (5th Cir. 1985). Petitioners err in contending (Pet. 25-26) that the decision in this case conflicts with the decision of the Ninth Circuit in *United States* v. *Dahlstrom*, 713 F.2d 1423 (1983), cert. denied, 466 U.S. 980 (1984). In the *Dahlstrom* case, the court concluded that the record did not support a finding that the tax shelter promoted in that case "contemplated *imminent* lawless action." 713 F.2d at 1428. By contrast, the undisputed facts of the present case (Pet. App. 61-68) amply demonstrate that several "lawless actions" resulted from petitioners' tax-protest program. The Ninth Circuit has, moreover, agreed with the view expressed by the court of appeals in the present case that the First Amendment does not prohibit injunctions in proper cases against the unlawful conduct proscribed by Section 7408. See *United States* v. *Estate Preservation Services*, 202 F.3d at 1106. There is thus no conflict among the circuits to warrant further review in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

CLAIRE FALLON
Acting Assistant Attorney General

RICHARD FARBER
THOMAS J. SAWYER
Attorneys

MAY 2001